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NOTICES

DEPARTMENT OF LABOR

Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; Enforcement of Job Offers with H-2A Applications

Friday, August 11, 1989

AGENCY: Employment and training Administration, Labor.

ACTION: Notice:.

SUMMARY: On February 27, 1989, the Employment and Training Administration (ETA) issued a policy memorandum clarifying an employer's responsibilities to U.S. and alien workers in the event that the employer's application for temporary alien agricultural labor (H-2A) certification is granted in whole or in part, or is denied. The memorandum explains the employer's obligations with respect to wages, benefits, and working conditions; and how apparent violations will be handled by ETA and the Employment Standards Administration (ESA).

The policy memorandum is published, in pertinent part, below for public information.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas M. Bruening, Chief, Division of Foreign Labor Certifications, Employment and Training Administration, Room N4456, Constitution Avenue, NW., Washington, DC 20210. Telephone: 202-535- 0165 (this is not a toll-free number).

Signed at Washington, DC this 3rd day of August, 1989.

Robert T. Jones,

Assistant Secretary of Labor.

February 27, 1989.

Memorandum For: Harry B. Brown, Regional Administrator, Seattle.

*33099 From: Donald J. Kulick, Administrator, Office of Regional management.

Subject: Enforcement of Job Offers with H-2A Applications.

Enforcement of apparent violations of H-2A related job offers would be handled as follows:

1. When certification is not granted (for any of the jobs in the employer's application). In this situation, the employer would not be subject to a finding of

a violation of labor certification from either ETA or ESA. If certification is not granted because of U.S. worker availability, but the workers have been hired as the result of SESA referrals, SESA action under the discontinuation of services procedures at 20 CFR part 658, Subpart F might be appropriate for employers who do not abide by the terms of the job order. Further, an employer could be subject to ESA penalties under MSPA.

2. When certification is granted (for any or all of the jobs in the employer's application). Under these conditions, the employer is obligated to comply with the provisions of the job offer and the labor certification, irrespective of whether the certification is actually used for the purpose of bringing foreign workers into the U.S. This obligation applies to all U.S. workers hired under the conditions approved in the job offer for the specific job openings and period of time involved and to workers in corresponding employment for the same period of time. Whether the U.S. workers were hired as the result of SESA referrals or through the employer's positive recruitment efforts is not material; both ETA and ESA penalties could be applied.

A variation on this type of situation could occur when a certified employer who decides not to use the certification to import aliens chooses to turn back and cancel the certification which has been granted. In this scenario, an employer would be obligated to comply with the terms of the job offer for his/her U.S. workers (SESA referrals and positive recruitment hires) up to the point in time when the certification has been turned back to the Regional Office, or be subject to H-2A penalties. Once the certification is cancelled, and the employer also cancels the job order with SESA, the employer would no longer be subject to H-2A penalties or SESA part 658 penalties for failure to comply with the conditions of the job offer except for those U.S. workers recruited through SESA referrals up to that point to whom hiring commitment has been made and who work for the employer into the originally stated duration of the job opportunity. (However, failure to continue to provide the wages and other benefits in the job offer to workers hired through positive recruitment or other means could subject the employer to possible MSPA penalties.) Further, under these circumstances, the employer would not be eligible for expedited redetermination or emergency certification processing in the event hired workers leave the job, and the employer decides to seek foreign workers again in the same season.

In order for a "cancellation" of a granted certification to be effective, an employer would have to actually return the original copy of the written certification determination to the Regional Office. The employer also would have to submit a signed document, such as a letter, stating that he/she has decided not to use the certification to bring aliens into the country.

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